

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 23 October 2003**

CASE NO. 2003-BLA~~5~~

In the Matter of:

JAMES C. HUMPHRIES,  
Claimant

v.

U.S. STEEL MINING CO., LLC,  
Employer

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
Party-in-Interest

Before: ROBERT J. LESNICK  
Administrative Law Judge

**DECISION AND ORDER ON MODIFICATION - DENYING BENEFITS**

This proceeding arises from a claim for benefits filed by James C. Humphries, a former coal miner, under the Black Lung Benefits Act, 30 U.S.C. §901, *et seq.* Regulations implementing the Act have been published by the Secretary of Labor in Title 20 of the Code of Federal Regulations.

Black lung benefits are awarded to coal miners who are totally disabled by pneumoconiosis caused by inhalation of harmful dust in the course of coal mine employment and to the surviving dependents of coal miners whose death was caused by pneumoconiosis. Coal workers' pneumoconiosis is commonly known as black lung disease.

The findings of fact and conclusions of law which follow are based upon my analysis of the entire record, including all documentary evidence admitted and arguments made. Where pertinent, I have made credibility determinations concerning the evidence.

**Procedural History**

Claimant, James C. Humphries, filed his first application for black lung benefits under the Act on August 12, 1991 (DX 26-1). However, Claimant failed to provide evidence essential

to processing the claim. Accordingly, the District Director issued an "Order to Show Cause Notice of Abandonment of Claim," dated September 16, 1991 (DX 26-5). Pursuant to the foregoing Order, Claimant was provided thirty (30) days to respond; and, in the absence of further action by Claimant, the Order to Show Cause served as a final notice of denial (DX 26-5). Although Claimant did not file a timely response to the above-referred Order, Claimant submitted another application for benefits on March 23, 1992 (DX 26-6). Since the application was filed within one year of the September 16, 1991 denial, it was considered as a modification request under §725.310. Following a formal hearing before Administrative Law Judge Lawrence E. Gray on October 26, 1993 (DX 26-37), Judge Gray issued a Decision and Order-Denying Benefits, dated July 29, 1994 (DX 26-44). Claimant did not appeal nor take any further action within one year of the foregoing decision. Accordingly, the above referred claim is deemed finally denied and administratively closed (DX 26).

On December 17, 1997, Claimant filed another application for black lung benefits under the Act (DX 27-1), which was denied by the District Director's office on March 10, 1998 (DX 27-13). On March 23, 1988, Claimant's lay representative filed a timely request for a hearing (DX 27-15). However, in correspondence dated July 2, 1988, he stated that there was no additional evidence to submit at that time. Accordingly, Claimant's lay representative stated that he was withdrawing the claim (DX 27-20).

On June 12, 2000, Claimant filed the current application for black lung benefits under the Act (DX 1). Following a formal hearing before an administrative law judge on October 24, 2001 (DX 32), the judge issued a Decision and Order-Denying Benefits, dated March 1, 2002 (DX 33). Although Claimant did not appeal the foregoing decision, he submitted another application for benefits form on May 1, 2002 (DX 34). By letter, dated June 20, 2002, the District Director stated, in pertinent part:

The Division of Coal Mine Workers' Compensation received from you on May 1, 2002, a completed Form CM-911 (Miner's Claim for Benefits under the Black Lung Benefits Act). Because your previous claim was denied less than one year ago on March 1, 2002, by the Office of Administrative Law Judges, we will consider this correspondence as a request for modification of the prior denial, in accordance with the Federal regulations, 20 CFR 725.310. You indicated in a phone conversation on June 19, 2002, that you wished to "keep your old claim open" rather than wait until March 1, 2003, to file a new claim.

A request for modification may be granted if:

1. a change in conditions has occurred; or
2. a mistake in a determination of fact was made at the time your claim was denied.

At this point, you may submit any evidence that would support a modification of the previous claim. This evidence must be submitted within thirty (30) days from the date of this letter. If additional time is required, you must notify this office in writing prior to July 20, 2002, advising the amount of time needed and the reason for your request.

(DX 35).

By letter dated August 22, 2002, the District Director's office stated, in pertinent part:

Since you did not submit any additional evidence in the time period allowed, or indicate an intention to submit additional evidence, we can only interpret your request for modification as a contention that the previous decision from the Office of Administrative Law Judges was based on a mistake in a determination of fact. Accordingly, your claim must be returned to the Office of Administrative Law Judges for adjudication.

(DX 36). Subsequently, this case was forwarded to the Office of Administrative Law Judges for further adjudication (DX 37).

Pursuant to my Notice of Hearing, dated December 16, 2002, a formal hearing of this case was initially scheduled before the undersigned on March 19, 2003, in Birmingham, Alabama. However, I issued an Order Rescheduling Hearing, dated February 10, 2003, in which the formal hearing was rescheduled for March 26, 2003. On or about March 24, 2003, Claimant's representative filed a "Motion to Submit Claim on Existing Record," in which I was advised that the "medical information and testimony are basically the same as in the previous hearing." Accordingly, "Claimant will not appear for a formal hearing scheduled on March 26, 2003 at 3 PM."

In view of Claimant's motion, and, in the absence of any objection by opposing counsel, I issued an Order Granting Decision on the Record, dated March 25, 2003. Furthermore, on April 23, 2003, I issued an Order Establishing Briefing Schedule, in which I held the record open until May 12, 2003, in order to allow the parties an opportunity to file closing briefs.

The record, as forwarded to this Office by the District Director, consists of 37 exhibits, which have been marked and received in evidence as Director's Exhibits 1 through 37 (DX 1-37). The case file also contains procedural motions and orders, as stated above.

### **Issues**

The contested issues are as follows:

- I. Whether the miner has pneumoconiosis as defined by the Act and the regulations?
- II. Whether the miner's pneumoconiosis arose out of coal mine employment?
- III. Whether the miner's disability is due to pneumoconiosis?
- IV. Whether the evidence establishes a change in conditions and/or that a mistake was made in a determination of fact in the prior denial per 20 C.F.R. §725.310?

(DX 37).

## **Findings of Fact and Conclusions of Law**

### **Modification Under 20 C.F.R. §725.310**

Since this case involves a modification request, the threshold issue is whether a change in conditions or a mistake in determination of fact has been established, as provided in §725.310.

In determining whether a “change in conditions” is established, the fact-finder must conduct an independent assessment of the newly submitted evidence (*i.e.*, all evidence submitted subsequent to the prior denial) and consider it in conjunction with the previously submitted evidence, to determine if the weight of the evidence is sufficient to demonstrate an element or elements of entitlement previously adjudicated against Claimant. However, in the present case, no substantive newly submitted evidence has been presented since the administrative law judge issued his Decision and Order-Denying Benefits, dated March 1, 2002 (DX 33). Accordingly, as stated by the District Director’s office, in correspondence dated August 22, 2002, Claimant’s modification request is solely based upon an alleged “mistake in a determination of fact.” (DX 36).

The Board has held that, in any case involving a modification request, the fact-finder should review the claim for a “mistake in a determination of fact,” regardless of whether it is specifically alleged. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994).

In his Decision and Order-Denying Benefits, dated March 1, 2002 (DX 33), the administrative law judge made the following findings:

1. Claimant engaged in coal mine employment for 41 years ending in 1991.
2. Employer is the properly designated responsible operator.
3. Claimant has one dependent, his wife, Janet.
4. Claimant has breathing problems for which he takes medication.
5. Although the recent arterial blood gas evidence is nonqualifying, and there is no evidence of cor pulmonale with right-sided congestive heart failure, the recent pulmonary function study results are qualifying; and, the medical opinion evidence also indicates that Claimant lacks the respiratory or pulmonary capacity to perform his usual coal mine work.
6. Weighing all of the new evidence together, Claimant has established total disability under §718.204(b).
7. By establishing total disability, Claimant has also demonstrated a material change in conditions under §725.309, since that was one of the elements of entitlement previously adjudicated against Claimant.
8. Following his discussion of the medical evidence, old and new, the judge concluded that Claimant had not established the presence of pneumoconiosis.
9. Since Claimant failed to prove the existence of pneumoconiosis, which is a threshold element of entitlement, Claimant also failed to establish that the disease arose out of coal mine employment and/or that it contributed to Claimant’s total disability. Therefore, the claim for benefits was denied.

(DX 33).

### Discussion and Analysis

Except as modified or superseded herein, all of the evidence which was previously discussed in the Decision and Order, dated March 1, 2002 (DX 33), is incorporated by reference herein. This obviates the necessity for a complete repetition of such evidence. Nevertheless, this Decision and Order is based upon my own independent analysis of the entire record.

Based upon my own analysis of the medical evidence, I also find that the new medical evidence, taken as a whole, establishes the presence of a totally disabling pulmonary or respiratory impairment. Since "total disability" had been one of the elements upon which the prior claim was finally denied, I also find that the finding of total disability constitutes a material change in condition under §725.309, as a matter of law.

The crux of this modification case rests, however, on whether the administrative law judge made a mistake in a determination of fact in the prior decision by finding that Claimant has not established the presence of pneumoconiosis. As set forth in the Decision and Order-Denying Benefits (DX 33, pp. 4-7), the record contains various chest x-ray interpretations of films dated June 2, 1992 (DX 26-12; DX 26-13), February 3, 1998 (DX 27-11; DX 27-12), and July 7, 2000 (DX 12,13,15), respectively.

Of the foregoing, only Dr. Nath's (1/1) interpretation of the July 7, 2000 film is positive for pneumoconiosis under the classification requirements set forth in §718.102(b). Dr. Nath is a dually qualified B-reader and Board-certified radiologist (DX 12).

On the other hand, all of the other interpretations are negative for pneumoconiosis. These include those by Drs. Russakoff (DX 26-13), Hasson (DX 27-11, and Ranavaya (DX 15), who are all B-readers. Moreover, Dr. Sargent, who is a dually qualified B-reader and Board-certified radiologist, reviewed all three of the films, and interpreted them all as negative for pneumoconiosis (DX 26-12; DX 27-12; DX 13).

In view of the foregoing, I find that the overwhelming preponderance of the x-ray evidence is negative for pneumoconiosis. Therefore, I find that Claimant has failed to establish pneumoconiosis under §718.202(a)(1).

Under §718.202(a)(2), a finding of pneumoconiosis may be made on the basis of biopsy or autopsy evidence. In the absence of any biopsy or autopsy evidence of pneumoconiosis, this subsection is not applicable.

Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found applicable. In the instant case, the presumption of §718.304 does not apply because the presence of complicated pneumoconiosis has not been established. Section 718.305 is inapplicable to claims filed after January 1, 1982. Finally, the presumption of §718.306 does not apply to living miner's claims. Therefore, the Claimant cannot establish pneumoconiosis under §718.202(a)(3).

Under §718.202(a)(4), a determination of the existence of pneumoconiosis may be made if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in §718.201. Pneumoconiosis, as defined in §718.201, means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both "Clinical Pneumoconiosis" and "Legal Pneumoconiosis." See 20 C.F.R. §718.202(a)(1) and (2).

Having carefully reviewed the previous Decision and Order, I find that an apparent willingness to "defer" to Judge Gray's discussion of the early physician opinion evidence was inappropriate (See DX 33, p. 5). If, as in the present case, a material change in condition has been established, then the entire record must be reviewed *de novo* to determine whether Claimant is entitled to benefits. However, for the reasons outlined below, I find, based upon my *de novo* review of the entire record, that the ultimate conclusions on the merits were correct.

The medical opinion evidence includes, in pertinent part, various old medical records, including a February 1981 hospital report (DX 26-22), the notes and/or reports of Dr. Michael Moore, dating back to March 3, 1981 (DX 26-22; DX 26-27), Dr. Jack Hasson's report, dated June 2, 1992 (DX 26-22), Dr. Moore's response to questions posed by Claimant's former counsel, dated June 25, 1992 (DX 26-27), Dr. Moore's deposition testimony, dated October 11, 1993 (DX 26-28), and, Dr. Hasson's report, dated February 3, 1998 (DX 27-9). In addition, the record includes the more recent medical opinions of Dr. Abdur Shad (DX 10) and Dr. Michael S. Sherman (DX 17), respectively.

In summary, the Bessemer Carraway Medical Center discharge report, issued by Dr. D. Barthold on March 2, 1981, lists the following final diagnoses: pneumoconiosis; bronchitis; chest pain probably related to bronchitis; impotence; and, possible hypertension (DX 26-22). Although various clinical test results are discussed within the discharge report, the specific basis for the diagnosis of pneumoconiosis is not provided. I note, however, that an "initial chest x-ray" reportedly "showed chronic fibrotic disease." Since I find the diagnosis of pneumoconiosis to be poorly reasoned, and/or based upon old, questionable x-ray evidence, I accord it little weight.

The medical opinion of Dr. Moore, who is Board-certified in Internal Medicine (DX 26-28, p. 6), is somewhat ambiguous regarding the pneumoconiosis issue. For example, when asked by Claimant's former counsel, on June 25, 1992, whether Claimant's pulmonary disease was related to or aggravated by his exposure to coal dust in coal mine employment, Dr. Moore answered as follows: "Etiology unclear, symptoms certainly aggravated by dust exposure." (DX 26-27). Arguably this may fall within the definition of "legal pneumoconiosis," as set forth in §718.201. However, even assuming that Dr. Moore had clearly diagnosed pneumoconiosis, he subsequently acknowledged, in his deposition testimony on October 11, 1993, that he was not prepared to offer an opinion as to whether Claimant has coal worker's pneumoconiosis (DX 26-28, pp. 36-37). Moreover, Dr. Moore also testified that, with regard to diagnosing coal worker's pneumoconiosis, he would defer to Dr. Hasson's opinion. In fact, Dr. Moore stated that he refers patients to Dr. Hasson who have difficult diagnostic problems; and, he trusts Dr. Hasson's judgment and abilities (DX 26-28, pp. 47-48).

Dr. Hasson, who was identified by other physicians of record as a B-reader and pulmonary specialist (DX 17; DX 26-28, pp. 47-48), examined Claimant on June 2, 1992 (DX 26-22) and February 3, 1998 (DX 27-9), respectively. On both occasions, Dr. Hasson reported that Claimant engaged in coal mine employment for 42 years, and never smoked. In addition, Dr. Hasson set forth Claimant's family and medical histories; subjective complaints; physical findings on examination; and the results obtained on various clinical tests, including chest x-rays, pulmonary function studies, arterial blood gas tests and EKG studies. Based upon the foregoing, Dr. Hasson consistently found, in pertinent part, "no evidence of pneumoconiosis." (DX 26-22; DX 27-9). Furthermore, in 1998, even though Dr. Hasson diagnosed "COPD," he did not relate the condition to Claimant's past coal mine employment; instead, Dr. Hasson listed the etiology as "intrinsic." (DX 27-9). In view of the foregoing, I find that pneumoconiosis has not been established based upon the early medical opinion evidence.

As stated above, the more recent medical opinion evidence consists of the reports of Drs. Shad (DX 10) and Sherman (DX 17), respectively.

Dr. Shad examined Claimant on July 7, 2000 (DX 10). On a U.S. Department of Labor form, Dr. Shad reported a coal mine employment history from March 1950 to 1991; and, he also noted that Claimant had "never smoked." In addition, Dr. Shad cited Claimant's family and medical history; subjective complaints; physical examination results, including "normal" findings of the thorax and lungs (DX 10). Although various clinical tests were administered in conjunction with Dr. Shad's examination, including a chest x-ray (DX 12,13,15), pulmonary function studies (DX 7), and arterial blood gas tests (DX 11), under the "Summary of Results" section of the form report, Dr. Shad only listed the positive (1/1) interpretation found on chest x-ray (DX 10, Sec. D5; *See* DX 12). Dr. Shad apparently did not consider the negative rereadings of the same x-ray (DX 13, 15). Furthermore, he did not provide a summary of results regarding the pulmonary function and arterial blood gas studies (DX 10, Sec. D5).

Under the Cardiopulmonary Diagnoses section of the U.S. Department of Labor form report, Dr. Shad set forth the following diagnoses and the underlying bases for such diagnoses:

Hypertension - History

Pneumoconiosis - CXR r/r opacities profusion 1/1 both lower zones

Obstructive Lung Disease - Spirometry

(DX 10, Secs. D6). When asked for the etiology of the cardiopulmonary diagnoses and the rationale for his opinion, Dr. Shad stated:

Hypertension: Essential

Pneumoconiosis: Coal Dust Exposure

Obstructive Lung Disease: Coal Dust Exposure

(DX 10, Sec. D7).

If credited, Dr. Shad's opinion would clearly warrant a finding of pneumoconiosis. However, Dr. Shad's diagnosis of pneumoconiosis is based upon a highly questionable positive chest x-ray reading which is inconsistent with the overwhelming preponderance of the x-ray evidence, including two negative rereadings of the same film. Dr. Shad's diagnosis of

obstructive lung disease due to coal dust exposure would also meet the legal definition of pneumoconiosis, as set forth in §718.201. However, Dr. Shad did not provide any rationale for his conclusion that Claimant's obstructive lung disease, as shown on spirometry, arose from Claimant's coal dust exposure. Moreover, Dr. Shad reported that Claimant had "never smoked." Although this negative smoking history is consistent with some of the reported histories (*See, e.g.* DX 26-22, DX 27-9), it is not borne out by other medical records and/or Claimant's own testimony. For example, the Bessemer Carraway Medical Center report, issued by Dr. Moore's on July 31, 1990, states, in pertinent part: "SOCIAL HISTORY: He has been a smoker in the past, but quit about 12 years ago." (DX 26-22). Furthermore, even though Claimant's testimony on October 24, 2001, suggested that he had only a negligible smoking history when he tried (unsuccessfully) to smoke when he was a kid (DX 30, p. 11), Claimant testified at the prior hearing held on October 26, 1993, that he had only quit smoking 20 years ago (DX 26-37, p. 19). Accordingly, the record contains evidence that Claimant smoked until 1978 (DX 26-22) or 1973 (DX 26-37, p. 19).

Since I do not know of any reason why Claimant would inflate his own cigarette smoking history, but note that understating it might be deemed helpful in securing a favorable medical opinion or legal decision, in conjunction with his claim(s) for black lung benefits, I credit the medical evidence and testimony which portrayed Claimant as a past smoker, who quit smoking in the 1970's.

In summary, I find that Dr. Shad's diagnosis of pneumoconiosis is based upon a questionable positive x-ray reading, and Dr. Shad's finding that Claimant's obstructive lung disease is due to coal dust exposure is poorly documented. Moreover, Dr. Shad's opinion may be based, at least in part, upon an erroneous cigarette smoking history. Accordingly, Dr. Shad's opinion is accorded little weight regarding the "pneumoconiosis" issue.

Dr. Michael S. Sherman, who is Board-certified in Internal Medicine, Pulmonary Disease, and Critical Care Medicine (DX 18), issued a report, dated September 9, 2000, in which he reviewed and analyzed the available evidence. Following his analysis of the relevant data, Dr. Sherman stated, in pertinent part:

...I cannot determine the cause of his [Claimant's] pulmonary impairment from the information given. I don't find that the evidence presented is convincing for determining the presence of pneumoconiosis. However, CWP remains a possible etiology for Mr. Humphries' condition. I would suggest the following be considered to help make a determination:

1. Repeat a set of full pulmonary function tests with spirometry, lung volumes, and diffusion capacity.
2. Perform a high resolution CT scan of the lung to look for evidence of pneumoconiosis or other etiologies of his restrictive disease that would not be apparent on a routine chest X-ray.

In addition, he may benefit from consultation with a pulmonologist for a further evaluation as to the etiology of his symptoms.



(DX 17).

Since Dr. Sherman did not find convincing evidence of pneumoconiosis; and, he was unable to ascertain the etiology of Claimant's pulmonary impairment, Dr. Sherman's opinion also does not establish (clinical or legal) pneumoconiosis, as defined in §718.201.

In the absence of any credible, well-reasoned, well-documented medical opinion evidence of pneumoconiosis, I find that Claimant has not established pneumoconiosis under §718.202(a)(4), or by any other means.

Finally, when one weighs all of the relevant evidence together under 20 C.F.R. §718.202(a), I find that Claimant has also not established pneumoconiosis. As discussed herein, the overwhelming preponderance of the x-ray evidence is negative for pneumoconiosis. The early, credible medical opinion evidence, in particular Dr. Hasson's opinion, clearly does not establish the pneumoconiosis. Finally, the more recent medical opinion evidence (*i.e.*, the poorly reasoned opinion of Dr. Shad and the inconclusive opinion of Dr. Sherman) is also insufficient to establish the presence of pneumoconiosis.

Since Claimant has failed to meet his burden of establishing the presence of pneumoconiosis under §718.202(a), he also cannot establish that the disease arose out of coal mine employment and/or that Claimant's total disability was due to pneumoconiosis. *See* 20 C.F.R. §§718.203 and 718.204(c).

### **Conclusion**

Having made a *de novo* review of all the relevant evidence, both old and new, I find that administrative law judge in the prior decision did not make a mistake in a determination of fact. To the contrary, based upon my independent analysis of the evidence, I have reached the same substantive findings and conclusions. Accordingly, Claimant is not eligible for benefits under the Act and regulations.

### **ORDER**

It is ordered that the claim of James C. Humphries for benefits under the Black Lung Benefits Act is hereby denied.

A

ROBERT J. LESNICK  
Administrative Law Judge

RJL/MP/dmr

**NOTICE OF APPEAL RIGHTS:** Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order, by filing a notice of appeal with the ***Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601.*** A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room B2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

